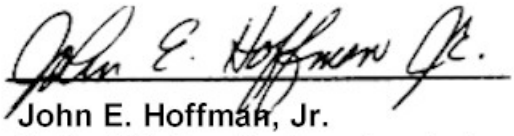

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

In re:	:	
	:	Case No. 05-51441
VIVIAN ANN KING,	:	Chapter 7
	:	Judge Hoffman
Debtor.	:	

ORDER DENYING UNITED STATES TRUSTEE'S MOTION FOR RECONSIDERATION PURSUANT TO FED. R. CIV. P. 59(e)

I. Background

On June 6, 2005, the Court held a hearing ("Hearing") on the United States Trustee's ("Trustee") motion to dismiss ("Motion to Dismiss") the Chapter 7 case of pro se debtor Vivian Ann King ("Debtor"). The Trustee had moved for dismissal under 11 U.S.C. § 707(b) and contended that granting the Debtor a discharge would be a substantial abuse of the provisions of Chapter 7 of the Bankruptcy Code. The Court made oral findings of fact and conclusions of law at the Hearing after the record was closed ("Oral Decision").

In weighing the totality of circumstances and considering the guidelines set forth in *In re Krohn*, 886 F.2d 123 (6th Cir. 1989) and *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429 (6th Cir. 2004), the Court found that granting Chapter 7 relief to the Debtor would not be a substantial abuse of the provisions of Chapter 7. As Judge Sellers noted in *In re Goddard*, 323 B.R. 231, 235 (Bankr. S.D. Ohio 2005), 11 U.S.C. § 707(b) establishes a presumption in favor of granting the relief requested by the Debtor—i.e., a discharge of her debts. For the reasons explained in the Oral Decision, the Court invoked the presumption in favor of the Debtor and denied the Trustee's Motion to Dismiss (*see* Order Denying Motion to Dismiss Pursuant to 11 U.S.C. § 707(b) dated June 8, 2005 (Doc. 38) ("Order")).[1]

The Trustee moves the Court to reconsider its Order.[2] Citing authority for the proposition that motions for reconsideration should be granted "if there has been a change in the law or facts or there is newly discovery evidence[,]" the Trustee submits that the Court should reconsider its Oral Decision and Order because "[the] facts relied on by the Court in the Order were inaccurate." Motion for Reconsideration at 1 (citing *Hale v. U.S. Trustee (In re Basham)*, 208 B.R. 926, 934 (B.A.P. 9th Cir. 1997), *aff'd*, 152 F.3d 924 (9th Cir. 1998) (other citation omitted)).

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[1]At the Hearing, the Court also overruled the Trustee's objection (Doc. 37) to the admissibility of Debtor's Amended Schedule J (Doc. 23). The Court directed the Debtor to file a revised Amended Schedule J using the Official Bankruptcy Forms within 30 days of the Hearing.

[2]*See* United States Trustee's Motion for Reconsideration Pursuant to Fed. R. Civ. P. 59(e) (Doc. 40) ("Motion for Reconsideration"). The Trustee timely filed his Motion for Reconsideration on June 13, 2005, within 10 days of the Court's Order. Debtor timely responded to the Trustee's Motion for Reconsideration. *See* Debtor[']s Response to [] and Rejection of the Motion to Reconsider by the United States Trustee (Doc. 42) ("Response"). The Debtor included a revised Amended Schedule J prepared on the Official Bankruptcy Form in compliance with the Court's Order.

A motion under Rule 59(e) does not present an opportunity to re-argue the same facts, law, or evidence and should not be used to present arguments that could, and should, have been raised during the litigation. *See Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). Because the Trustee simply seeks to relitigate the issues considered at the Hearing, the Motion for Reconsideration must be denied.

II. Legal Analysis

A. Standard Governing Motions for Reconsideration

"[M]otions for reconsideration are not recognized by the Federal Rules of Civil Procedure or Bankruptcy Procedure." *Dimeff v. Good (In re Good)*, 281 B.R. 689, 699 (B.A.P. 10th Cir. 2002). Although "[w]hen a party files a motion to reconsider a final order or judgment within ten days of entry, [the court] will generally consider the motion to be brought pursuant to [Fed. R. Civ. P.] [] 59(e)." *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 617 (6th Cir. 2002). *See also Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1047 (6th Cir. 2001) ("Motions for reconsideration filed within ten days of the district court's final judgment, as this one was, are generally treated as a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e)."). Fed. R. Bankr. P. 9023 makes Fed. R. Civ. P. 59 applicable to bankruptcy cases. *See Hogan v. Dicicco (In re Hogan)*, 79 Fed. Appx. 846, 848 (6th Cir. 2003) (unpublished).

The Motion for Reconsideration is entrusted to the Court's discretion as "[t]he grant or denial of a Rule 59(e) motion is within the informed discretion of the [trial] court, reversible only for abuse." *Scotts Co. v. Cent. Garden & Pet Co.*, 403 F.3d 781, 788 (6th Cir. 2005) (citation omitted). "[T]he bankruptcy court has broad discretion in determining whether to grant a motion to alter or amend judgment. . . . A motion made pursuant to Rule 59 affords relief only in extraordinary

circumstances." *Crystalin, L.L.C. v. Selma Props., Inc. (In re Crystalin, L.L.C.)*, 293 B.R. 455, 465 (B.A.P. 8th Cir. 2003).

"Motions to alter or amend judgment may be granted if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. To constitute 'newly discovered evidence,' the evidence must have been previously unavailable." *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1998) (citations omitted). "As a general principle, motions for reconsideration are granted if the moving party demonstrates: (1) a clear error of law; (2) newly discovered evidence that was not previously available to the parties; or (3) an intervening change in controlling law." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Arctic Exp., Inc.*, 288 F. Supp. 2d 895, 900 (S.D. Ohio 2003) (citing *GenCorp*, 178 F.3d at 834). "Motions for reconsideration do not allow the losing party to 'repeat arguments previously considered and rejected, or to raise new legal theories that should have been raised earlier.'" *Id.* (citation omitted). *See also Int'l Union United v. Bunting Bearings Corp. (In re Bunting Bearings Corp.)*, 321 B.R. 420, 423 (Bankr. N.D. Ohio 2004) ("A motion under Rule 59(e) is not an opportunity to re-argue a case. Rule 59(e) motions are aimed at re consideration, not initial consideration. Thus, parties should not use them to raise arguments which could, and should, have been made before judgment issued. Motions under Rule 59(e) must either clearly establish a manifest error of law or must present newly discovered evidence.") (quoting *Engler*, 146 F.3d at 374).

"Arguments and evidence which could have been presented earlier in the proceedings cannot be presented in a Rule 59(e) motion." *In re Hupton*, 287 B.R. 438, 445 (Bankr. N.D. Iowa 2002) (citing *Peters v. Gen. Serv. Bureau, Inc.*, 277 F.3d 1051, 1057 (8th Cir. 2002)). "The function of

a motion to alter or amend a judgment is not to serve as a vehicle to relitigate old matters or present the case under a new legal theory . . . [or] to give the moving party another 'bite at the apple' by permitting the arguing of issues and procedures that could and should have been raised prior to judgment." *Mathis v. U.S. (In re Mathis)*, 312 B.R. 912, 914 (Bankr. S.D. Fla. 2004) (alteration in original) (quoting *Mincey v. Head*, 206 F.3d 1106, 1137 n.69 (11th Cir. 2000)). *See also Mantle Ranches, Inc. v. U.S. Park Serv.*, 950 F.Supp. 299, 300 (D. Colo. 1997) ("[A] motion for reconsideration is not a license for a losing party's attorney to get a second bite at the apple. . . .") (citations and internal quotation marks omitted).

B. The Trustee's Reconsideration Request

Based upon the Trustee's post-Hearing review of Hearing exhibits offered by the Debtor and his questions about the veracity of Debtor's testimony concerning her obligation to pay student loans on behalf of her children, the Trustee urges the Court to revisit and ultimately reverse its Order. In this case, no error or change in the law has been alleged, leaving "newly discovered evidence" and "manifest injustice" as the only other grounds recognized by the Sixth Circuit for granting reconsideration. As discussed below, the grounds asserted in support of the Trustee's Motion for Reconsideration do not, as a matter of law, establish a basis for granting the relief requested. At the pretrial conference held on April 6, 2005, the Court set a May 2, 2005 deadline for the Debtor to amend her Schedules I and J, which she failed to meet. *See* Proceeding Memo dated April 29, 2005. However, on May 4, 2005, *more than one month before the Hearing*, Debtor submitted and filed her Hearing exhibits (including an Amended Schedule J) in compliance with the deadline set forth in the Court's pretrial order. *See* Pretrial Scheduling Order Following Pretrial Conference (Doc. 21)

(setting a deadline of four business days before the commencement of the Hearing for submission of exhibits).[3]

Together, the Debtor's Amended Schedule J and Hearing exhibits documented additional expenses not included in the original Schedule J she filed with her bankruptcy petition. *See* Docs. 23-34. While the Amended Schedule J did not include a line item for student loan payment obligations, one of her Hearing exhibits (Doc. 33) ("Student Loan Exhibit") showed that Debtor is the sole obligor on various "Parent Plus" student loans, and that her children are not co-obligors on these loans. Debtor submitted the following summary of the outstanding balances she owes on the student loans:

Student Loan Provider	Principal Balance
Sallie Mae ("Sallie Mae")	$32,673.93
Direct Loans ("Direct Loans")	$51,347.00

See Student Loan Exhibit at 2.

As previously noted, at the Hearing the Court overruled the Trustee's objection to the admissibility of Debtor's Amended Schedule J (Doc. 23). The Trustee did not object to the admission of the Debtor's other Hearing exhibits, including the Student Loan Exhibit; thus, all of Debtor's exhibits were admitted at the Hearing. In determining whether to dismiss the Debtor's petition under § 707(b), the Court inquired about the Debtor's "ability to repay h[er] debts out of future earnings." *Behlke*, 358 F.3d at 434 (citation omitted). The Court specifically asked the

[3]While Debtor did not technically comply with the Court's request to file amended schedules, her timely submission of Hearing exhibits containing essentially the same information called for by the schedules substantiated her expenses. *See Celestino v. Montauk Club*, 2002 WL 484685, at *23 (E.D.N.Y. 2002) ("[E]ven if [plaintiff] is not in technical compliance with the local rules, her pro se submission, taken as a whole and viewed in the light most favorable to her as the party opposing summary judgment, is sufficient to raise material issues of fact that require a trial.").

Debtor to provide the total amount she is obligated to pay on all the student loans on a monthly basis. After a brief recess, Debtor testified that she is obligated to pay approximately $2,500 per month on all the student loans, but has only been able to pay approximately $1,400 per month.

On cross-examination, the Trustee failed to adduce testimony or offer other evidence to rebut Debtor's testimony concerning the total amount of her monthly student loan obligations. The Trustee insinuated that Debtor was not obligated to pay the student loans at present, because her children had not yet finished their schooling. And the Trustee asked the Debtor why she had not consolidated her Direct Loans and stretched out the payment plan so as to decrease the amount she was obligated to pay on a monthly basis. The Debtor responded that she did not want to defer payment on the student loans given her age and expected substantial reduction in disposable income when she retires within two years. In the end, the Trustee did not elicit sufficient evidence to refute the Debtor's testimony that she, *alone*, is obligated on all the student loans to make approximately $2,500 per month in payments.

After denial of his Motion to Dismiss, the Trustee admitted that "[f]ollowing the trial, the [Trustee] again reviewed the student loan exhibits entered by the Debtor." Motion for Reconsideration at 2. Based on this more in-depth, post-Hearing review of the Student Loan Exhibit, the Trustee asks the Court to reconsider its Order. The Trustee asserts that, contrary to Debtor's testimony, she is not currently obligated to make payments on the Direct Loan portion of the student loans because they "have a forbearance date of July 21, 2005." Motion for Reconsideration at 2. Based on the Student Loan Exhibit, the Trustee also asserts that the Debtor is not obligated to make payments on the Direct Loans because "forbearance continues until six months after graduation[,] [of the Debtor's children from the schools they are attending]." *Id.*

Based on these factual assertions drawn from the post-Hearing review of the Student Loan Exhibit, the Trustee contends that Debtor's testimony that she has monthly student loan obligations totaling $2,500 was incorrect. The Trustee surmises that Debtor incorrectly calculated this $2,500 per month figure by adding the accrued interest amount listed on the Direct Loans paperwork to the current $400 monthly payment listed on the Sallie Mae documentation. *See id.* at 3 (citing Student Loan Exhibit). The problem with the Trustee's argument is that it is based on an "attempt[] to supplement the record with previously available evidence." *Tolbert v. Potter*, 2005 WL 1533112, at *1 (E.D. Mich. 2005). The Student Loan Exhibit was readily available up to a month before the Hearing and the Debtor's testimony concerning the student loans was offered at the Hearing. The Trustee's bid for reconsideration of the Order fails because the evidence in question—the Student Loan Exhibit and Debtor's testimony—is not "newly discovered;" it was available prior to or at the Hearing.[4]

"[A] party that fails to introduce facts in . . . opposition cannot introduce them later in a motion to amend by claiming that they constitute 'newly discovered evidence' unless they were previously unavailable." *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001) (rejecting Rule 59(e) motion that "sought to introduce facts that were available earlier in the proceedings.") (citing *GenCorp*, 178 F.3d at 834). "To obtain reconsideration, [parties] must establish that newly proffered evidence was discovered after the hearing and that they 'could not

[4]Importantly, the Trustee also did not request a recess or continuance to review the Student Loan Exhibit in detail following Debtor's testimony. *See Javetz v. Bd. of Control, Grand Valley St. Univ.*, 903 F.Supp. 1181, 1192 (W.D. Mich 1995) (holding that opinions of plaintiff's expert were not "previously unavailable" so as to justify their late submission in Rule 59(e) motion, in part, because of plaintiff's failure to move for an extension of the discovery deadline). Nor does it appear that the Trustee deposed the Debtor prior to the Hearing.

with reasonable diligence have discovered and produced such evidence at the hearing.'" *Madden v. Deloitte & Touche, LLP*, 118 Fed. Appx. 150, 154, (9th Cir. 2004) (unpublished) (quoting *Frederick S. Wyle Prof. Corp. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir.1985)). "The motion for reconsideration is not an opportunity for a party to correct its own procedural failures or introduce evidence that should have been brought to the attention of the court prior to judgment." *Johnny Blastoff, Inc. v. Los Angeles Rams Football Co.*, 188 F.3d 427, 439 (7th Cir. 1999). Thus, the Court concludes that the evidence upon which the Trustee's reconsideration request is based is not "newly discovered" and does not warrant the Court's reconsideration of its Oral Decision and Order.

Nor is reconsideration required to prevent manifest injustice. The Trustee bases the Motion for Reconsideration on a reexamination of the Student Loan Exhibit that occurred *after* the Hearing. The Trustee could have examined the Student Loan Exhibit prior to or during the Hearing and cross-examined the Debtor concerning its contents. *See Ciralsky v. C.I.A.*, 355 F.3d 661, 673 (D.C. Cir. 2004) (affirming lower court holding that "[m]anifest injustice does not exist where, as here, a party could have easily avoided the outcome, but instead elected not to act until after a final order had been entered."). *See also Bunting Bearings Corp.*, 321 B.R. at 423 ("As applied to Rule 59(e), no general definition of manifest injustice has ever been developed; courts instead look at the matter on a case-by-case basis. What is clear from case law, and from a natural reading of the term itself, is that a showing of manifest injustice requires that there exist a fundamental flaw in the court's decision that without correction would lead to a result that is both inequitable and not in line with applicable policy.").

Because the Trustee offers grounds in support of his Motion for Reconsideration that could have been raised at the Hearing, and because "[reconsideration] motions cannot be used to . . . raise

arguments which could have been offered or raised prior to entry of judgment[,]" *Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998), the Court declines to reconsider its Oral Decision and Order.

III. Conclusion

The Trustee's reconsideration bid amounts to an after-the-fact attempt to relitigate the issues presented at the Hearing, based on evidence that was available both before and during the Hearing. The Trustee is simply not entitled to another "bite at the apple." *Mathis*, 312 B.R. at 914. For these reasons, the Motion for Reconsideration is **DENIED**.

IT IS SO ORDERED.

Copies to:

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Kristopher E Aungst, Office of the U.S. Trustee, *170 N. High Street, Suite 200, Columbus, Ohio 43215*

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